

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN RICE, ET AL.,	:	CIVIL ACTION
	:	NO. 99-5155
Plaintiffs,	:	
	:	
v.	:	
	:	
SCHNEIDER NATIONAL CARRIERS	:	
INC., ET AL.	:	
	:	
Defendants.	:	

Memorandum and Order

AND NOW, this **16th** day of **November**, **2001**, upon consideration of plaintiffs' motion to add delay damages (doc. no. 154) and defendants' motion answer to plaintiff's motion to add delay damages (doc. no. 155), it is hereby **ORDERED** that the plaintiff's motion (doc. no. 154) is **GRANTED IN PART** and **DENIED IN PART**. It is **FURTHER ORDERED** that the amount delay damages is \$18,587.50. The court's order is based on the following reasoning:

On July 18, 2001, a verdict was entered in favor of the plaintiffs and against the defendants in the amount of \$250,000. The plaintiffs subsequently filed a motion to seek delay damages in this case in the amount of \$20,612.50. The defendants contest the amount of delay damages to be added and argue that damages should total only \$7,457.50. The defendants dispute the date on which service of process was made on the defendants. Furthermore, they argue that the period for which to calculate

delay damages should be reduced to account for plaintiffs' requests to delay calling the case to trial and for plaintiffs' failure to submit discovery materials, which, they claim, resulted in the defendant's failure to properly assess the claims against them. The court finds that the defendants' arguments with respect to service of process and the plaintiffs' requests to delay trial have merit, but determines that the delay damages should not be reduced for plaintiff's alleged failure to submit discovery materials.

A plaintiff may request that damages for delay be added to the amount of compensatory damages awarded against each defendant found liable to the plaintiff in a jury verdict. See Pa. R. Civ. P. 238(a)(1). Damages should be awarded from "one year after the date of original process was served in the action up to the date of the award, verdict or decision." Pa. R. Civ. P. 238(a)(2)(ii). The period for which delay damages is calculated shall exclude the time after which the defendant has made a written offer of settlement for 90 days or until the commencement of the trial (provided that the plaintiff did not receive more than 125% of the offer). See Pa. R. Civ. P. 238(b). The period of delay damages should not include any time "during which the plaintiff caused delay of the trial." Pa. R. Civ. P. 238(b)(2).

The plaintiffs and defendants dispute the date on which to begin the computation of delay damages. Plaintiffs contend

that service of process was made on September 27, 1999, while defendants argue that service was not made until October 8, 1999. Under Pennsylvania Rule of Civil Procedure 403, service must be made by mailing a copy of the process to the defendant by return receipt. If the mailing is refused, than the plaintiff shall mail a copy to the defendant by ordinary mail and service is complete if the mail is not returned to the sender within 15 days after the mailing. See Pa. R. Civ. P. 403.

In this case, the defendants refused the original mailing, and the plaintiffs mailed the defendants a copy of the process by ordinary mail. The defendants did not receive the service until October 8, three days after the plaintiffs' second mailing. Thus, plaintiffs' delayed damages should not be computed from September 28, 2000, one year after the original mailing, but from October 8, 2000, a year after service was actually made. The total amount of the days for which the plaintiff seeks delay damages should be reduced by 10 days.

The defendants further allege that the delay damages should be excluded for a period of 16 days, for which plaintiffs' counsel requested the court not to call the case to trial. The case was scheduled to be placed in trial pool on March 20, 2001. On February 1, 2001, counsel for plaintiffs requested the court not to call the case for the 15 days from March 23 until April 8, because of prepaid vacation plans. Plaintiffs' counsel also requested on May 10, 2001 not to call the case to trial on May

21, 2001, when he would be in New York.

The defendants rely on Sealover v. Carey Canada, Inc., 996 F.2d 42 (3d Cir. 1993) (citing Wirth v. Miller, 398 Pa. Super. 244, 580 A.2d 1154 (1990)), for the proposition that a delay caused by plaintiffs' counsel should not be computed for delay damages purposes. The Sealover court states that "the period of time a trial was delayed due to a continuance requested by the plaintiff should be excluded from the period for which delay damages are awarded." 996 F.2d at 46. Nevertheless, as the court in Wirth noted, only delays that actually cause delay of trial shall be excluded. See 398 Pa. Super. at 254, 580 A.2d at 1159.

In this case, the court was prepared to call the case to trial on March 20, 2001, the date it was to be placed in the trial pool. Since the court was prepared to call the case to trial, the plaintiffs' requests thus postponed the beginning of trial. The defendants are entitled to reduce the delay damages accordingly. The total amount of delay damages the plaintiffs seek should be reduced by an additional 16 days.

Defendants also seek to exclude 155 days from the delay damages period (February 2001 to date of trial), arguing that the plaintiffs' failure to provide information in discovery prevented the defendants from being able to assess the claims and thus precluded a settlement offer. The defendants argue that they were not given income tax information, nor were their discovery

requests updated to reflect that plaintiff John Rice stopped working in February 2001, five months before trial. They argue that this information significantly altered his earning capacity claim. Had they had this information, defendants argue, they "perhaps" then would have made a settlement offer which would insulate them from delay damages liability "if it was within 125% of the amount of the verdict."

The defendants rely on the trial court's opinion in Sealover v. Carey Canada, 791 F.Supp. 1059 (M.D. Pa. 1992), vacated by Sealover v. Carey Canada, 996 F.2d 42 (3d Cir. 1993) (reversing the district court's decision concerning delay damages for a period where plaintiff's counsel requested a continuance but not deciding on "the propriety of the remainder of the award"). The trial court stated that a party can only have the duty to make a fair settlement claim when he has an opportunity to assess the claim. Sealover, 791 F.Supp. at 1068. In a bodily injury action, that assessment would encompass "a review of the injuries and the prognosis, work loss, verified and related expenses and an assessment of the evidence as it bears on liability." Id. (quoting Sherrill v. Port Authority of Allegheny County, 383 Pa. Super. 104, 556 A.2d 450, 460 (1989)).

Both the Sealover and Sherrill cases can be distinguished. In Sealover, an asbestos exposure case, the issue was whether the plaintiff's failure to answer the defendant's interrogatories for eight months excluded that period from the

calculation of delay damages. The information withheld from the defendant in Sealover was pertinent to whether the plaintiff was exposed to the defendant's product, an essential piece of information upon which to assess the plaintiff's claim. The court found that eight months was an unreasonable time to respond to the interrogatories. The court held that without knowledge of whether the plaintiff had been exposed to its product, the defendant was in no position to make a reasonable settlement offer.

In the case before the court, the defendants have had significantly more information to assess the claims than the defendant in Sealover. The case was filed on October 19, 1999. Per the court's July 7, 2000 order, discovery was to be completed by September 29, 2000. The case went into the trial pool on March 20, 2001. The defendants thus had a year and a half to assess the claim.

The issue in Sherrill arose not because a plaintiff withheld information thereby making it difficult for the defendant to assess the claim, but because unforeseen and significantly higher damages were discovered after the case was remanded for a new trial, resulting in a significantly higher damage award. The court was confronted with attempting to determine what the delay damages were in between filing and the first - and lower - verdict. The court held that the award of delay damages must be calculated based on the damages that were

foreseeable at that time, not those that were awarded after the second trial. In Sherrill, it was thus not possible for the defendant to assess the claim because at the time the defendant should have made a settlement offer, it was not conceivable that the damages would escalate to such levels.

The issue is thus whether the defendants were able to fairly assess the claims against them. Although they did not have perfect information, it would appear that they had significantly more information than the defendants in both Sealover and Sherrill. It cannot be that the defendant must have perfect information, only that the defendant must be able to assess the claim. Furthermore, the defendants' claim appears highly speculative. They argue that if they had this information, they might have made a settlement offer and that settlement offer might be within 125% of the final verdict. The defendants are not entitled to a reduction of these 155 days from the time calculating the delay damages.

Thus, from October 8, 2000, to December 31, 2000, there are 85 days, or .23 years, from which to calculate delay damages for 2000. From January 1, 2001, to July 18, 2001, there are 199 days, from which the court should subtract 16 because of the plaintiff's delay. There are then 183 days, or .50 years, from which to calculate delay damages for 2001. "Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first addition of the Wall Street Journal published for

each calendar year for which the damages are awarded, plus one percent, not compounded." Pa. R. Civ. P. 238(a)(3). For 2000, the interest rate should be 9.5% and for 2001 the interest rate should be 10.5%. See id. Add. to Expl. Cmt. In calculating the damages for 2000, delay damages should equal the amount of the award (\$250,000) multiplied by the interest rate (.095) multiplied by the portion of the year to which damages are entitled (.23). The final award for 2000 is thus \$5,462.50. For 2001, the calculations equal \$250,000 multiplied by .105 multiplied by .50, which equals \$13,125. Total delay damages thus equal \$18,587.50.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.